

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA**

ROGER STOKELY,

Petitioner,

v.

JOE McGRATH,

Respondent.

CV F 01-6030 AWI WMW HC

**ORDER RE FURTHER
BRIEFING**

Petitioner is a state prisoner proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. This petition was filed on July 21, 2001.

PROCEDURAL HISTORY

On October 3, 2002, the Magistrate Judge assigned to this case entered findings and recommendations recommending that this petition be dismissed as barred by the one year statute of limitations set forth in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The Magistrate Judge found that the statute of limitations had run on May 22, 1997, and that Petitioner was not entitled to equitable tolling during the four-year gap

1 between his first and second state collateral actions. The Magistrate Judge further found that
2 Petitioner was not entitled to equitable tolling based on the allegation that the delay was due
3 to medical reasons. Specifically, the Magistrate Judge found that Petitioner had not carried
4 his burden of showing that his mental health problems had rendered him unable to timely file
5 his habeas petition, because he did not provide any specific information describing his
6 mental illness. The court noted that Petitioner did not “describe his condition, nor does he
7 provide the dates during which he was affected by his condition.”

8 On October 28, 2002, Petitioner filed objections to the Magistrate Judge’s findings
9 and recommendation. Attached to the objections was a psychological report dated
10 September 16, 1996. On December 16, 2002, the District Judge adopted the findings and
11 recommendations of the Magistrate Judge and granted Respondent’s motion to dismiss.

12 Petitioner appealed the judgment. On September 10, 2004, after the parties made a
13 joint motion for summary reversal of this court’s order dismissing the petition, the Court of
14 Appeals for the Ninth Circuit reversed and remanded the case. Respondent stipulated to a
15 remand of this case in light of the decision in Laws v. LaMarque, 351 F.3d 919 (9th Cir.
16 2003), which was decided after this court issued its decision in this case. The matter was
17 remanded for “further factual development and, if appropriate, an evidentiary hearing on
18 whether appellant is entitled to equitable tolling.”

19 Counsel was appointed on remand. Pursuant to this court’s order, the parties have
20 submitted supplemental briefs “addressing the issue of whether a need exists for an
21 evidentiary hearing on whether Petitioner is entitled to equitable tolling.”

22 LEGAL STANDARDS

23 The statute of limitations period is subject to equitable tolling if “extraordinary
24 circumstances beyond a prisoner’s control” have made it impossible for the petition to be
25 filed on time. Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), *citing*
26 Alvarez-Machain v. United States, 107 F.3d 696, 701 (9th Cir. 1996), *cert denied*, 522 U.S.

814, 118 S.Ct. 60, 139 (1997); Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1288 (9th Cir.), *overruled in part on other grounds by*, Calderon v. United States Dist. Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (*en banc*) (noting that "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time"). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir.1999), *citing Kelly*, 163 F.3d at 541; Beeler, 128 F.3d at 1288-1289.

The burden of demonstrating that extraordinary circumstances exist lies with the petitioner. United States v. Marolf, 173 F.3d 1213, 1218 n. 3 (9th Cir.1999); Allen v. Lewis, 255 F.3d 798, 801 (9th Cir.2001) (observing that petitioner "produced no evidence demonstrating that the loss of access to his habeas materials for 27 days due to his prison transfer made it impossible for him to file his federal habeas petition 16 days earlier").

A petitioner's claim of mental illness alone is insufficient to equitably toll the limitations period. Although some courts have recognized mental illness as a basis for equitable tolling of a federal statute of limitations, they have done so only where the mental "illness in fact prevent[ed] the sufferer from managing his affairs and thus from understanding his legal rights and acting upon them." Miller v. Runyon, 77 F.3d 189, 191 (7th Cir.1996); *see, also*, Nunnally v. MacCausland, 996 F.2d 1, 6 (1st Cir.1993); United States v. Page, 1999 WL 1044829, at *1-2 (N.D.Ill. Nov. 16, 1999); Decrosta v. Runyon, 1993 WL 117583, at *2-3 (N.D.N.Y. Apr. 14, 1993); Speiser v. United States Dept. of Health & Human Services, 670 F.Supp. 380, 384 (D.D.C.1986); *cf.* Accardi v. United States, 435 F.2d 1239, 1241 n. 2 (3rd Cir.1970) ("Insanity does not prevent a federal statute of limitations from running."); Boos v. Runyon, 201 F.3d 178, 184 (2nd Cir.2000) ("The question of whether a person is sufficiently mentally disabled to justify tolling of a limitation period is ... highly

1 case-specific."); Runyon, 77 F.3d at 192 ("Most mental illnesses today are treatable by drugs
2 that restore the patient to at least a reasonable approximation of normal mentation and
3 behavior. When his illness is controlled he can work and attend to his affairs, including the
4 pursuit of any legal remedies that he may have.").

5 In Laws v. LaMarque, the district court denied a habeas corpus petition as untimely,
6 rejecting the application of equitable tolling because the record did not show that the
7 petitioner's mental illness made it impossible for him to meet the § 2244(d) deadline. The
8 Ninth Circuit held as follows:

9 We do not know whether Laws's mental condition had deteriorated since his trial
10 such that he fell below a minimum standard of legal competence. *See Godinez v.*
11 *Moran*, 509 U.S. 389, 399 n. 10, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993); *924
12 *Massey v. Moore*, 348 U.S. 105, 75 S.Ct. 145, 99 L.Ed. 135 (1954); *Rohan*, 334 F.3d
13 at 810-11. The only material in the record concerning the period 1996-2000 is Laws's
14 un rebutted allegation, in his state petition, that he was "deprived [] of any kind of
15 cons[ci]ousness" in those years. We must construe *pro se* habeas filings liberally,
16 *Maleng v. Cook*, 490 U.S. 488, 493, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989), and
17 may treat the allegations of a verified complaint or petition as an affidavit, *McElyea*
18 *v. Babbitt*, 833 F.2d 196, 197-98 (9th Cir.1987). The verified state petition attached to
19 Laws's Traverse is therefore indistinguishable from the declaration appended to a
20 petitioner's opposition to a motion to dismiss that, in *Whalem/Hunt*, 233 F.3d at 1147,
21 we found sufficient to warrant further factual development.

22 The district court denied Laws equitable tolling because "the record does not show
23 that [his] mental problems made it 'impossible' " for him to meet the § 2244(d)
24 deadline. But we do not require Laws to carry a burden of persuasion at this stage in
25 order to merit further investigation into the merits of his argument for tolling. Rather,
26 our cases require only that there be "circumstances consistent with petitioner's
27 petition ... under which he would be entitled to a finding of an 'impediment' under
28 2244(d)(1)(B) or to equitable tolling" for further factual development to be required.
Whalem/Hunt, 233 F.3d at 1148. On this record, the district court erred in granting
judgment against Laws based upon the papers then before it. It is enough that Laws
"alleged mental incompetency," *Calderon (Kelly)*, 163 F.3d at 541, in a verified
pleading, see *Herbst*, 260 F.3d at 1043 n. 4, 1044. The district court should then have
allowed discovery or ordered expansion of the factual record. *See Rules Governing*
Section 2254 Cases 6 & 7. Laws's ability to file state and federal petitions in 2000
and thereafter through assistance by another inmate cannot substitute for development
of the factual record concerning his mental state prior to that period.

Of course, a petitioner's statement, even if sworn, need not convince a court that
equitable tolling is justified should countervailing evidence be introduced. The record
in this case is patently inadequate, however, to allow us or any other court to evaluate

1 the strength of Laws's claim. In 1993 it took three psychiatrists, two psychologists,
2 and a judge to decide Laws's competence at the time of the inquiry. It is plain that
3 more factual development is required before we can say that Laws was or was not
precluded from filing his petition by reason of mental impairment several years ago.

4 Id. at 924.

5 **DISCUSSION**

6 In his supplemental brief, Petitioner submits the following as further factual
7 development and additional support for equitable tolling of the one-year statute of
8 limitations. First, Petitioner relies on a psychological report provided as Exhibit A to his
9 objections to the findings and recommendations filed with this court on October 28, 2002.
10 As Petitioner explains, the 17-page report of Randall C. Epperson, Ph.D., a
11 neuropsychologist, is dated September 16, 1996. Petitioner argues that this document alone
12 provides a *prima facie* showing that during the period when he should have filed his habeas
13 corpus petition in federal court (July 1996 - July 1997), Petitioner suffered from an
14 “extraordinary circumstance” or condition that justifies equitable tolling.
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17 Second, Petitioner relies on mental health documents from his Central File
18 maintained by the Department of Corrections. Petitioner claims that these documents, along
19 with the 1996 psychological report, demonstrate his retarded intellectual functioning, and a
20 long history of severe emotional disturbance and mental illness that includes several
21 custodial evaluations, administration of psychotropic medications, and psychiatric treatment
22 before, during and after the time he was required to file his legal pleadings in federal court.
23 Petitioner argues that a person as severely damaged as his is should be excused from the
24 filing requirements. Petitioner therefore requests a status conference be set “to determine
25 whether additional documentation, mental health evaluations, etc., are necessary or
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1 appropriate, and whether an evidentiary hearing should be held.”

2 In response, Respondent contends that after further factual development, the evidence
3 establishes that Petitioner is not entitled to equitable tolling based on mental incompetency.
4 That is, Respondent argues that the 1996 psychological report and Petitioner’s Central File
5 do not establish that Petitioner is entitled to equitable tolling for the four-year time period
6 between 1996 and 2000, based on mental incompetence.
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8 In regard to the 1996 psychological report, Respondent contends that this report does
9 not establish Petitioner’s mental incompetence, but rather identifies Petitioner’s mental
10 health issues, which included major depressive disorder with psychotic features, attention
11 deficit hyperactivity disorder, borderline intellectual functioning, and personality disorder
12 with dependent, paranoid and antisocial features. Respondent argues that the report does not
13 identify Petitioner was mentally incompetent, but does raise concerns about Petitioner’s
14 mental health. Respondent concedes that the report “leads to questions about Petitioner’s
15 mental capabilities.” Respondent argues, however, that Petitioner had the ability to file a
16 petition for writ of habeas corpus in the Court of Appeal on June 6, 1996, which was denied
17 on July 3, 1996. This petition was filed just three months before the psychological report
18 done on September 16, 1996, identifying Petitioner as having mental health issues.
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20 Respondent concludes that Petitioner should not be entitled to equitable tolling based on his
21 alleged mental incompetence in 1996, when he was able to file a state habeas petition during
22 that same time period. Specifically, he concludes that Petitioner cannot demonstrate that he
23 is entitled to equitable tolling based on the alleged “extraordinary circumstance” of mental
24 incompetence in 1996, when he was able to file a state habeas corpus petition during that
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1 same time period. Respondent relies on the principle that a petitioner must show that the
2 extraordinary circumstances were the cause of his untimeliness. See Stillman v. LaMarque,
3 319 F.3d 1199, 1203 (9th Cir.2003) (petitioner entitled to equitable tolling “since prison
4 officials' misconduct proximately caused the late filing.”).

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6 Alternatively, Respondent contends that even if this court accepts that the 1996
7 psychological report established Petitioner’s mental incompetence at that time, Petitioner is
8 still not entitled to equitable tolling for the entire four-year time period between 1996 and
9 2000. Respondent argues that the report, which identified Petitioner’s mental disorders as of
10 September 16, 1996, cannot be used as evidence of his mental state in subsequent years. He
11 argues that Petitioner’s Central File evidences that he was not entitled to tolling for the four-
12 year time period because he was not mentally incompetent. Respondent summarizes the
13 content of the mental health files contained within Petitioner’s Central File and argues that
14 they clearly establish that by November 3, 1997 (when he was not taking any psychiatric
15 medications and was in remission) and no later than November 3, 1998 (when he was
16 discharged from the mental health program and noted as having no mental health needs) he
17 was in complete remission from his psychiatric conditions. However, Petitioner did not file
18 his second state collateral action until July 17, 2000, approximately two years and eight
19 months from the date that he was not taking any psychiatric medications and was in
20 remission (November 3, 1997) and approximately one year and eight months after he was
21 discharged from the prison mental health program (November 3, 1998). Respondent argues
22 that Petitioner was therefore not entitled to equitable tolling during this period of time and
23 his present federal petition, filed July 24, 2001, was untimely and is barred by the statute of
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1 limitations.

2 Respondent concludes that the court should deny Petitioner's request for a status
3 conference, because there is no showing of a need for an evidentiary hearing. Respondent
4 asks the court to affirm its prior judgment granting his motion to dismiss this action as barred
5 by the statute of limitations.
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7 In his reply to Respondent's supplemental brief, Petitioner argues that in light of the
8 evidence of the 1996 psychological report and the mental health records in the Central File,
9 Petitioner "should not be barred . . . from a Status Conference to determine whether
10 further factual development (subpoenaing of other records, appointment of psychiatrists, etc.)
11 is necessary, or, if appropriate, evidentiary hearing.
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13 The court finds that in requesting a status conference to determine whether additional
14 factual development is necessary and whether an evidentiary hearing should be held,
15 Petitioner ignores the directive of this court in regard to the purpose of the supplemental
16 briefing. The parties were ordered to submit briefs "addressing the issue of whether a need
17 exists for an evidentiary hearing on whether Petitioner is entitled to equitable tolling." No
18 mention of a subsequent status conference was made by the court. Thus, any arguments that
19 Petitioner has in support of a need for an evidentiary hearing were to be made in his
20 supplemental brief, not later. The purpose of an evidentiary hearing is to resolve the merits
21 of a factual dispute. Petitioner presents no arguments in his supplemental brief regarding
22 what information could be gleaned regarding his alleged mental incompetence through an
23 evidentiary hearing. He simply asks for a status conference to determine whether further
24 factual development and an evidentiary hearing are necessary.
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1 The court has already given Petitioner an opportunity, through the supplemental
2 briefing, to demonstrate why an evidentiary hearing is needed in this case. Petitioner has not
3 done so. It is the role of Petitioner's counsel, not the court, to propose specific factual
4 development to support his claim. Accordingly, the court finds no basis for an evidentiary
5 hearing, and will not order one.
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7 Petitioner expressly submits his arguments regarding the 1996 psychological report
8 and Petitioner's Central File as "further factual development" in this case. He does not,
9 however, explain what other factual development he would like to pursue or how it is
10 necessary to the court's understanding of this case. The court finds that the parties have
11 essentially agreed that under Laws v. LaMarque, Petitioner has made the initial showing
12 regarding an impediment under § 2254(d)(1)(B) such that further factual development was
13 required. Petitioner has now had the opportunity to develop the facts and has done so by
14 lodging a series of documents with the court from his Central File. Petitioner, however,
15 presents no specific arguments regarding the content of these documents. The burden of
16 demonstrating that extraordinary circumstances exist such as would justify equitable tolling
17 lies with the petitioner. Marolf, 173 F.3d at 1218 n. 3. While the court's prior order directed
18 the parties to address the issue of an evidentiary hearing, it did not direct the parties to
19 address the merits of Petitioner's claim regarding equitable tolling. It appears that
20 Petitioner's counsel may not yet have fully presented the court with his arguments regarding
21 the claim. Therefore, out of an abundance of caution, the court will give the parties a final
22 opportunity to address the issue of equitable tolling.
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26 Accordingly, in light of the foregoing, IT IS HEREBY ORDERED as follows:
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- 1) Petitioner's request for a status conference is DENIED;
- 2) Petitioner is granted thirty (30) days from the date of service of this order within which to file a second supplemental brief addressing the merits of Petitioner's claim for equitable tolling, particularly in light of the further factual development provided by the documents from Petitioner's Central File; Respondent is granted thirty (30) days thereafter to file a response; Petitioner is granted fifteen (15) days thereafter to file a reply to Respondent's response. IT IS SO ORDERED.

Dated: February 8, 2006

mmkd34

/s/ William M. Wunderlich

UNITED STATES MAGISTRATE JUDGE